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MISCELLANEOUS:

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft 1968) 14
Annot., 50 A.L.R. 2d 943 (1956) 8
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Gardner, *The Perception and Memory of Witnesses*, 18 Corn. L.Q. 391 (1933). 21
Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960) ... 16
Hutchins and Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 Harv. L.Rev. 860 (1928) 21
McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154 (1970). 17
8A *Moore's Federal Practice*, § 48.03[1] (Cipes ed. 1970) 10
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Note, *Constitutional Right to a Speedy Trial: The Elements of Prejudice and the Burden of Proof*, 44 Temp. L.Q. 310 (1971) 22
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1 *U.S. Code Cong. & Ad. News* 1351 (1954) 15

IN THE

Supreme Court of the United States

No. 70-19

UNITED STATES OF AMERICA, *Appellant*

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH, *Appellees*

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE APPELLEE WILLIAM R. MARION

QUESTIONS PRESENTED

The appellee William R. Marion adopts the Government's statement of Question 1. He restates Questions 2.-4. as follows:

2. Whether the dismissal of the indictment represented an abuse of the District Court's discretion to dismiss an indictment for want of prosecution or for unnecessary delay in presenting the charge to a grand jury under F.R.Crim.P. 48(b).

3. Whether the Sixth Amendment's guarantee of a speedy trial obtains before the indictment is filed.

4. Whether formal proof of purposeful or oppressive Government motive or prejudice other than loss

of the accused's own memory are conditions to dismissal of an indictment for failure to afford a speedy trial.

COUNTERSTATEMENT

The indictment, filed April 21, 1970, charged that, from approximately mid-March of 1965 until early 1967,[1] a period of nearly 23 months, the appellee William R. Marion and the co-appellee Samuel C. Cratch controlled a corporation known as Allied Enterprizes, Inc., engaged in the business of selling home intercom and alarm systems on credit to homeowners in the Washington, D. C., metropolitan area. The deferred portion of the purchase price for each system was usually secured by a junior mortgage on the customer's home, and customers were asked to participate in a referral plan by which they received money payments from Allied Enterprizes, Inc., for new purchasers of Allied's product solicited by them. As conducted, the business was said to have involved mail and wire fraud and the interstate transportation of false securities. (App. 2-5).

In December of 1966, the Federal Trade Commission began an investigation of the business practices of Allied Enterprizes, Inc., and, finding some of them objectionable, issued an initial cease-and-desist order (by default) on February 6, 1967, and a final order on April 11, 1967. Allied Enterprizes, Inc., conducted no business after February 6, 1967. (Exhibit A to Motion to Dismiss Indictment; App. 23).

Beginning September 1, 1967, and continuing at intervals through October 11, 1967, *The Washington*

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[1] The last event charged as a part of the "fraud" is alleged to have occurred January 19, 1966 (App. 11).

Post newspaper printed a series of articles, some appearing on its front page, exposing the allegedly illegal activities of various business firms in obtaining junior mortgages to secure their customers' indebtedness for the credit purchase of home improvement materials and services.[2] The articles asserted, *inter alia,* that the companies were then being investigated by United States Postal Inspectors, the FHA, the FTC, and the Justice Department; that the U.S. Attorney's office had begun receiving complaints about them more than two years earlier; that on March 30 [of 1967] "Federal investigators" had delivered a "lengthy" report to the U.S. Attorney; that the U.S. Attorney had set up a "special fraud squad" in July [of 1967]; that a Justice Department "specialist on frauds" had been assigned to assist in presenting evidence to a grand jury which had been sworn in [on October 9, 1967]; that the Assistant U.S. Attorney in charge of the "fraud squad," Seymour Glanzer, had been relieved of other duties to enable him to concentrate on the case; and that the U.S. Attorney expected indictments "within two weeks." (Exhibits B-H, J-L, to Motion to Dismiss Indictment; App. 25-28)[3]

The articles were accompanied by editorials on October 6 and 16, 1967, entitled, respectively, "Despicable

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[2] At oral argument, counsel for the Government stipulated to the authenticity of the articles but not to the truth of their contents. (App. 35). The Government has at no time, however, disputed the accuracy of the quotations and statements attributed to the then U.S. Attorney for the District of Columbia.

[3] Appellee's company, Allied Enterprizes, Inc., and appellee Marion, were both mentioned by name in the article appearing on page A-1 of the Wednesday, October 4, 1967, edition of the *Post,* entitled "Intercom Buyers Expected Prizes but Got Mortgages." (Exhibit F, Motion to Dismiss Indictment).

Racket" and "Crimes Against the Poor." (Exhibits I, M, to Motion to Dismiss Indictment).

Sometime between the "summer of 1968" (according to appellee Marion) and "January of 1969" (according to the Government) Marion delivered all of the records of Allied Enterprizes, Inc., to Assistant U.S. Attorneys Seymour Glanzer and Sandor Frankel, and discussed his activities with them in detail. (App. 13, 31, 34). The records have remained in custody of the U.S. Attorney's Office since that time. (App. 31, 34).

Thereafter, appellee Marion, who was neither arrested nor formally charged at any time prior to indictment, was told nothing whatsoever as to what disposition was to be made of the accusations against him until he was advised that a subpoena had been issued to compel his presence before a grand jury (sworn in the previous September) on March 16, 1970. (App. 13).

The indictment of April 21, 1970, drawn in 19 counts, charged the appellee Marion, as both principal and aider-and-abettor, with mail fraud, wire fraud, and interstate transportation of false securities against 21 victims alleged by name, and "divers other persons," between March 15, 1965, and February 6, 1967. (App. 2-11).

At his arraignment April 29, 1970, Marion entered a plea of Not Guilty to all counts. His Motion to Dismiss was filed May 5, 1970, heard and granted by District Judge George L. Hart, Jr., on June 8, 1970, and the indictment ordered dismissed as to both defendants. (App. 40). From that Order this appeal by the Government is taken.

SUMMARY OF ARGUMENT

I. The dismissal of the indictment for lack of speedy prosecution did not sustain a "motion in bar" as defined by this Court under former 18 U.S.C., § 3731, because the dismissal did not "bar" subsequent prosecution for the same events, is not a ruling contemplated by the Criminal Appeals Act to have required direct review by this Court, and was essentially a discretionary dismissal of which review by this Court would not be consistent with its own narrow construction of its appellate jurisdiction of appeals by the Government in criminal prosecutions terminating favorably to the accused.

II. The dismissal of the indictment was a discretionary dismissal for want of prosecution or for unnecessary delay in presenting the charge to the grand jury under Rule 41(b), F.R.Crim.P., and the District Judge did not abuse his discretion in dismissing an indictment filed more than three years after the Government learned of the alleged crime and the circumstances of its commission, and the identity of the defendant.

III. The dismissal of the indictment for failure to afford the accused his right to a speedy trial under the Sixth Amendment was consistent with purposes for which the right exists, viz., to protect the accused against the anxiety occasioned by accusations of crime and the possibility of an unfair trial on stale charges, to induce the Government to proceed with orderly expedition in bringing criminal charges to trial, and to secure for society the objectives of the criminal process of punishment, deterrence, and rehabilitation. Notwithstanding the delay occurs prior to the formal filing of the indictment, reason and authority require the

Sixth Amendment right to a speedy trial to prohibit unnecessary delay in acting upon accusations of crime at all stages of the process, independently of the statute of limitations. Neither Governmental malice nor loss of specific evidence need be formally proved as a condition to relief from such unnecessary delay.

ARGUMENT

I. THE RULING OF THE DISTRICT JUDGE MAY NOT BE APPEALED DIRECTLY TO THIS COURT

The Order Granting Appellee's Motion To Dismiss the Indictment Did Not Sustain a "Motion in Bar" Under Former Title 18, U.S.C., § 3731

The Court has held that it possesses appellate jurisdiction only to the extent conferred by statute, and in criminal cases upon appeals by the Government the statute will be strictly construed. *Carroll* v. *United States,* 354 U.S. 394 (1957). Not only does such an appeal "offend the policies behind the double-jeopardy prohibition," but when taken prior to trial in a pending case further delays any subsequent proceedings required. *Will* v. *United States,* 389 U.S. 90, at 96 (1967).

The policy sought to be implemented by the former direct-review provision of the Criminal Appeals Act contemplated prompt, final, and universally-binding resolution of controversial rulings purporting to decide broad questions of law which, as precedents, might impair the Government's ability to prosecute other cases. See *United States* v. *Mersky,* 361 U.S. 431, at 434-436 (1960); Harlan, J., dissenting in *United States* v. *Vuitch,* 402 U.S. 62, [28 L.ed. 2d 601, at 616-618] (1971). The District Judge in the instant case made no such ruling. Upon a unique state of facts "in this case," (App. 39), he held simply that the Government,

having knowledge of an alleged crime, the identity of the persons alleged to have committed it, and all of the details of its commission, for its own reasons dallied too long in beginning the process of bringing the defendants to trial.

The Government contends *United States* v. *Weller,* 401 U.S. 254 (1971) is conclusive of the Court's jurisdiction to entertain this appeal. Its import, however, is, if anything, to the contrary. In *Weller,* this Court remanded the appeal to the Court of Appeals, holding itself without jurisdiction to pass upon the Government's direct appeal from the dismissal of an indictment on non-constitutional grounds, deciding once more on analogy to the rules of common law pleading that the particular ground of dismissal was not equivalent to a "plea in bar." In *Weller,* although the appellee's motion to dismiss had been based upon the constitutional ground of the Fifth Amendment, the indictment was dismissed on the nonconstitutional ground that the offending regulation was not authorized by the enabling statute. As had the appellee in *Weller,* the appellee Marion in the instant case moved to dismiss on Fifth and Sixth Amendment grounds, but the District Judge did not purport to rule on constitutional grounds. Both Weller and Marion (by his plea of Not Guilty) maintained, moreover, that their respective acts were "simply not a crime." *Id.,* at 260.

Thus, because *Weller,* is *not* dispositive, as it did in *Weller* and in its precedents, the Court must look beyond the pleadings in this case to "the effect of the ruling sought to be reviewed." Only if the effect is "to end the cause and exculpate the defendant" may it be treated as a "bar" to the prosecution and, thus, appealable to the Court. *United States* v. *Hark,* 320 U.S. 531,

at 536 (1944); *United States* v. *Blue,* 384 U.S. 251 (1966).

Dismissals for want of prosecution have historically not been regarded as a "bar" to subsequent prosecution for the same events. *Cohen* v. *United States,* 366 F.2d 363 (9th Cir. 1966); *United States* v. *Apex Distributing Company,* 270 F.2d 747 (9th Cir. 1959); *Mann* v. *United States,* 304 F.2d 394 (D.C. Cir. 1962); *Ex parte Altman,* 34 F.Supp. 106 (D.S.D. Cal. 1940); *Annot.,* 50 A.L.R. 2d 943 (1956). Cf. *United States* v. *Cadarr,* 197 U.S. 475 (1905). Nor does the Government's practical inability or unwillingness to complete the prosecution under the conditions of the order from which it seeks to appeal for that reason alone render it a decision subject to direct review by this Court. *Carroll* v. *United States,* 354 U.S. 394 (1957); *United States* v. *Sweet,* 399 U.S. 517 (1970). Cf. *United States* v. *Sisson,* 399 U.S. 267 (1970). Indeed, such an order may not be appealable at all. *United States* v. *Hester,* 325 F.2d 654 (9th Cir. (1963); *United States* v. *Apex Distributing Company, supra.*

On the other hand, at least one Court of Appeals has presumed its jurisdiction of such an appeal (and the statute, of course, provided for mutually exclusive rather than concurrent jurisdiction in this Court and the circuit courts of appeal). *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947).

In ruling upon appellee Marion's Motion to Dismiss, the District Judge, after summarizing the chronology of the alleged offenses and the common community knowledge of them, of the Government's desultory response, he said:

> "The Court, therefore, views that there has been a lack of speedy prosecution *in this case,* and will

grant the Motion to dismiss." (App. 39) (Emphasis supplied).

His decision, in terms, therefore, was limited to "this case." It made no reference to the Constitution, nor did it purport to find some other "extraneous factor," such as the statute of limitations or immunity, an insuperable obstacle to prosecution. It appears, therefore, to have been based entirely upon Rule 48(b), F.R.Crim.P., which, in unambiguous language, declares the universal, traditional, and inherent discretionary power of a court to dismiss an indictment if there has been "unnecessary delay in presenting the charge to a grand jury . . ." once the defendant has been "held to answer" in the District Court.

This Court has not, to date, held such a purely discretionary ruling appealable to this Court rather than to the appropriate circuit court of appeals under the former 18 U.S.C., § 3731. To allow a direct appeal of such ruling to this Court would not only fail to fulfill the legislative objective of the Criminal Appeals Act but would attenuate the principle of the restrictive construction of the Court's appellate jurisdiction to the point of rendering virtually every discretionary dismissal of an indictment by a trial judge susceptible of direct review here.

II. THE DISTRICT JUDGE PROPERLY EXERCISED HIS DISCRETION IN DISMISSING THE INDICTMENT FOR UNNECESSARY DELAY IN PRESENTING THE CHARGE TO A GRAND JURY

The Accusations of Crime and the Identity of the Accused Were Common Knowledge in the Community, and the Defendant's Records in the Possession of the Government, Several Years Before the Indictment Was Filed

The power of a trial court to dismiss an action for want of prosecution is a discretionary power of "ancient origin." *Link* v. *Wabash R. Co.*, 370 U.S. 626, at 630 (1962). It has ". . . generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*, at 630-631. Rule 48(b), F.R.Crim.P., is a ". . . restatement of the inherent power of the court to dismiss a [criminal] case for want of prosecution." *Notes of Advisory Committee on Rules,* Rule 48(b). See 8A *Moore's Federal Practice* § 48.03[1] (Cipes ed. 1970). The exercise of a discretionary power by a trial court is subject to review on appeal only for an abuse of that discretion. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528, (1960); *United States* v. *DeLeo,* 422 F.2d 487, at 495 (1st Cir. 1970), certiorari denied 397 U.S. 1037 (1970), and the scope of review limited to determining that the decision not have been "arbitrary, fanciful, or clearly unreasonable," *United States* v. *McWilliams,* 163 F.2d 695, at 697 (1947), taking "account of the law and the particular circumstances of the case and . . . directed by the reason and conscience of the judge to a just result." *Burns* v. *United States,* 287 U.S. 216, at 222-223 (1932).

Disregarding altogether the accuracy of the newspaper articles appearing in early October 1967, it is

undisputed that, by February 6, 1967, the Federal Trade Commission had completed its investigation and prosecuted to a successful conclusion its own proceedings to terminate what it deemed to be the appellee's unlawful business activity. It is further undisputed that the articles, in fact, were published in a daily newspaper of general circulation in the Washington, D. C., metropolitan area, with the appellee named by name and his alleged crime described in detail to the community at large, together with editorial exhortations to his prompt punishment. Finally, it is undisputed that, sometime during the ensuing two years, appellee not only voluntarily delivered all of his business records to the Assistant United States Attorney in charge of the case, but also, without compulsion, discussed his business activities with them.

The indictment was not returned until April 21, 1970.

The Government's unelaborated explanation attributed the delay in its presentation to the grand jury to insufficient personnel to work on such cases of relatively low priority. (App. 35; Jurisdictional Statement, 7). In the circumstances, it can hardly be said to be "arbitrary, fanciful, or clearly unreasonable" to find a delay of over three years in presenting the charge to a grand jury unnecessary.

III. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL SHOULD ATTACH AND OBTAIN THROUGHOUT THE CONTINUUM OF CRIMINAL LAW ENFORCEMENT FROM OFFENSE TO COMPLETION OF PUNISHMENT

An Accused Should Be Tried, Subject to the Requirements of Ordered Expedition, Within a Reasonable Time After the Government Discovers, or Should Have Discovered in the Exercise of Due Diligence, That a Crime Has Been Committed by Him

Notwithstanding its early and eminent origins, the history of the right to a speedy trial has not been well-documented, nor have its dimensions been fixed with precision. Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, at 483-485 (1968); Brennan, J., concurring in *Dickey* v. *Florida,* 398 U.S. 30, at 40 (1970). Nevertheless, in tracing its lineage to the Magna Carta (1215), Chief Justice Warren said in *Klopfer* v. *North Carolina,* 386 U.S. 213, at 223 (1967):

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage."

Its purposes include the prevention of unnecessary incarceration prior to trial, the minimization of anxiety and concern accompanying public accusation, and the limitation of the possibilities that long delay will impair the ability of an accused to defend himself. *United States* v. *Ewell,* 383 U.S. 116, at 120 (1966). Even in the absence of physical restraint, an impending prosecution may subject the potential defendant to public scorn, deprive him of employment, and curtail his speech, association, and participation in unpopular causes. *Klopfer* v. *North Carolina, supra,* at 221-222.

Prompt disposition of accusations of criminal conduct is important to accused, accuser, and society at

large, for all of the reasons justifying the existence of the criminal law itself—punishment, deterrence, and rehabilitation. As time elapses from the moment an alleged offense takes place, the objectives of the criminal process become increasingly difficult to attain. For the accused who is innocent, or believes himself wrongly accused, the most important practical consequence of the passage of time is the attrition of his ability to respond to the accusation. And for the accused who is oblivious of the state's purpose to try him for the acts of which he is accused, the effect is exacerbated by his inattention to the necessity of preserving the evidence to do so. The ministerial formality of the filing of the indictment or information merely serves as notice to him that he must attempt to reassemble what may already have been irretrievably lost. Even an awareness that he is "under investigation," which perhaps produces more anxiety than a known and pending charge, does not apprise an accused of the crime he is suspected of committing or the identity of his accuser.

The Government correctly observes (Br. 15), however, that a majority of the circuit courts of appeal has applied the conventional rule, apparently first expressed in *D'Aquino* v. *United States,* 192 F.2d 338, at 350 (9th Cir. 1951), that the right to a speedy trial does not arise until "... a formal complaint is lodged against the defendant in a criminal case," and that as to the interval following the commission of an alleged offense until an indictment or information is filed, the statute of limitations exclusively delimits the time during which the accused is exposed to prosecution. See *Nickens* v. *United States,* 323 F.2d 808 (D.C. Cir. 1963), certiorari denied 379 U.S. 905 (1964); *Hoopengarner* v. *United States,* 270 F.2d 465 (6th Cir. 1959).

This Court has not approved the conventional rule, which has encountered both judicial and academic criticism, e.g., Rives, J., concurring in *Harlow* v. *United States,* 301 F.2d 361, at 375 (5th Cir. 1962); Wright, J., concurring in *Nickens* v. *United States,* 323 F.2d 808, at 812-813 (D.C. Cir. 1963); Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, at 488-490 (1968); Note, *The Lagging Right to a Speedy Trial,* 51 Va. L.Rev. 1587, at 1613-1615 (1965). See *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial,* at 22 (Approved Draft 1968). Moreover, before the conventional rule developed currency, lower courts proceeded on the unexpressed assumption that pre-indictment delay should be included in computing the interval during which the right to a speedy trial obtained, *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956); *Petition of Provoo,* 17 F.R.D. 183 (D.Md. 1955), aff'd. 350 U.S. 857 (1955), and aversion to Fabian investigations of complaints of crime seems to have been very much a part of the "English law heritage" of the right to a speedy trial. See *King* v. *Robinson,* (1765) 96 E.R. 313 (Lord Mansfield, C.J.); Alderson, B., in *Queen* v. *Robins,* (1844), 1 Cox C.C. 114, at 114.

Nevertheless, when the statute of limitations became acknowledged as the measure of the uncharged suspect's right to expedite disposition of accusations made against him, the District of Columbia Circuit Court of Appeals held, in the circumstances of one case, a pre-indictment delay of seven months to violate the right to due process under the Fifth Amendment. *Ross* v. *United States,* 349 F.2d 210 (D.C. Cir. 1965). Due process reasoning to reach the same result solely because the unconscionable delay occurs prior to indict-

ment, however, has been criticized as a misapplication of "typical speedy trial criteria." Note, *The Lagging Right to a Speedy Trial,* 51 Va. L.Rev. 1587, at 1616 (1965); Note, *Effective Guaranty of a Speedy Trial for Convicts in other Jurisdictions,* 77 Yale L.J. 767, at 783 (1968).

The Bill of Rights imposes restraints upon the power of the Federal government generally, not merely the judicial branch. *Ex parte Wilson,* 114 U.S. 417, at 426 (1885). It is for the Court, therefore, to decide whether the Sixth Amendment shall encompass pre-indictment delay within the protection of the right to a speedy trial, and, if so, whether its dimensions coincide in all cases with the period of limitations prescribed by Congress.[4] There is, of course, no statute of limitations for capital crimes, 18 U.S.C., § 3281. Yet persons accused of capital crimes are certainly entitled to a speedy trial. *Petition of Provoo,* 17 F.R.D. 183 (D.Md. 1955), aff'd, 350 U.S. 857 (1955).

It is during the pre-indictment stage of the criminal process that both the accused and the Court have the least control over both the character of the inquisition

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[4] The statute of limitations on non-capital crimes (18 U.S.C., § 3282) in effect from 1876 (19 Stat. 32) to 1954 was perfunctorily amended in that year to increase the period from three to five years by an unrelated amendment to a House of Representatives bill to deny annuities to government employees convicted of certain offenses. 1 *U.S. Code Cong. & Ad. News* 1351, at 1355 (1954). The House bill (H.R. 9909) was amended in the Senate, apparently at the "urgent request" of the Department of Justice for more time to detect and prosecute corrupt public officials. 100 Cong. Rec. 14781 (1954) (remarks of Sen. Williams). The effect of the amendment, however, was not confined to crimes of public officials.

and the pace at which it proceeds. The accused has no right at this stage to know the names of his accusers, *Scher* v. *United States,* 305 U.S. 251 (1938); 18 U.S.C., § 3432, or the information reported by them. 18 U.S.C., § 3500. The proceedings before the grand jury occur entirely without the participation or even the observation of an accused. Only attorneys for the Government are present. Rule 6(d), F.R.Crim.P. And even if the grand jury indicts, it is ultimately left entirely to the discretion of the United States Attorney as to who shall be prosecuted, when, and for what crimes. *United States* v. *Thompson,* 251 U.S. 407 (1920); *Goldberg* v. *Hoffman,* 225 F.2d 463 (7th Cir. 1955); *Newman* v. *United States,* 382 F.2d 479 (D.C. Cir. 1967). The accused cannot compel the government to take him into custody at his convenience, *Hoffa* v. *United States,* 385 U.S. 293 (1966), and thus force the attachment of his post-arrest rights. *Hedgepeth* v. *United States,* 364 F.2d 684 (D.C. Cir. 1966). He may not, even after indictment, be able to learn what took place during the period he was "under investigation," either as a matter of right, see *United States* v. *Augenblick,* 393 U.S. 348 (1969), or in practice. See *United States* v. *Bryant* (App. Nos. 23,957 and 24,105, D.C. Cir. decided January 29, 1971). Cf. *United States* v. *Wade,* 388 U.S. 218 (1967).

In sum, the period between the complaint of an accuser to the prosecuting authorities and the filing of the indictment is the interval in which the accused is least able to hasten the inquiry or affect the result, and the latitude for official procrastination (and corruption) most extensive. See, generally, Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69

Yale L.J. 543 (1960); McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases,* 56 A.B.A.J. 1154 (1970).

Scholars have recommended, some states and Federal circuits have implemented, and Congress is considering legislation to establish fixed periods within which, following arrest or indictment, a defendant must be put on trial. Note, *The Lagging Right to a Speedy Trial,* 51 Va. L.Rev. 1587, at 1620 (1965); *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases* (1971); *Hedgepeth* v. *United States,* 364 F.2d 684, at 686 (D.C. Cir. 1966); Title I, S.895, *The Speedy Trial Act of 1971.* For purposes served by the Sixth Amendment right to speedy trial, however, such rules will be utterly vitiated should the Government be allowed to continue to prepare its cases as it presently does, clandestinely and at its leisure, during the entire five-year hiatus of the period of limitations, and, after indictment, precipitate unprepared defendants to trial in the sanctified cause of speedy justice.

The Government argues that the word "accused" means one formally "charged" with a crime (Br. 16)—in other words, one who has, in fact, become a *defendant.* The Sixth Amendment, however, in terms, speaks of the rights an *accused* shall enjoy. Holding a propinquitous Sixth Amendment right (to the assistance of counsel) to attach when ". . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. . .", *Escobedo* v. *Illinois,* 378 U.S. 478, at 490-491 (1964) (but see Stewart, J., dissenting, *id.,* at 493-494), the Court said:

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend

> on whether at the time of the interrogation, the authorities had secured a formal indictment." *Escobedo* v. *Illinois,* 378 U.S. 478, at 486.

This Court, moreover, has not limited the concept of a "charge" of crime to the indictment or information. In construing the word as used in the Constitution, Article IV, Section 2, relating to extradition, the Court held that the word "charge" was used ". . . in its broad signification . . ."

> "[A] party is charged with crime when an affidavit is filed, alleging the commission of the offense, and a warrant is issued for his arrest; and this is true whether a final trial may or may not be had upon such charge. It may be, and is, true, that in many of the states some further proceeding is, in the higher grade of offenses at least, necessary before the party can be put upon trial . . ." *In re Strauss,* 197 U.S. 324, at 331 (1905).

The spectrum of the possible points at which a criminal prosecution can be said to have "commenced" is virtually infinite. Quantitatively, it may begin with the commission of an offense in the presence of a police officer. It may begin with an arrest; or upon the complaint of a victim or a witness, or the report of an informant to the authorities; or upon the filing of a complaint or the issuance of a warrant. It may take inception from an administrative investigation. Qualitatively, it can be thought to begin when a "general inquiry" begins to "focus on a particular suspect;" or when probable cause exists to arrest or to indict; or when the authorities are reasonably certain they have the evidence to convict. The only factor common to all is the need to proceed with orderly dispatch to a conclusion once begun.

For the reason that neither quantitative nor qualitative criteria will suffice in all cases, therefore, the right to a speedy trial should attach when the Government knows, or ought with reasonable diligence to know, a crime has been committed by the one who is ultimately brought to trial. And, of course, only orderly expedition should be required throughout at all stages, consistent with the legitimate interest of the Government in completing its investigation, preparing its case, and exercising its executive discretion whether to proceed to trial, but consistent also with the interest of the accused in preparing his defense and in knowing his fate as promptly as possible, and consistent with the interest of society in the efficient administration of criminal justice.

The Government argues that, if pre-indictment delay is to be taken into account in determining whether Constitutional rights—either speedy trial or due process—have been violated, then either the delay must be shown to have been "purposeful or oppressive" or the accused must show "actual" prejudice in making his defense.

Pollard v. *United States,* 352 U.S. 354 (1957), in which the phrase "purposeful or oppressive" first appeared, *id.* at 361, did not hold a delay in proceedings of whatever magnitude of no consequence if occurring "accidentally" rather than "purposefully or oppressively." It held merely that delayed reimposition of sentence, necessitated by the technical invalidity of the original and timely sentencing, did not, in the circumstances of the case, violate the right to a speedy trial. Moreover, four justices dissented from the majority opinion so holding, and in subsequent cases this Court has not considered the Government's motive of significance in finding prosecutorial delay to have denied

a speedy trial, notwithstanding the absence of proof that the prosecuting authorities acted "purposefully" or "oppressively." *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967); *Smith* v. *Hooey,* 393 U.S. 374 (1969); *Dickey* v. *Florida,* 398 U.S. 30 (1970). As the Court has said in another context, "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady* v. *Maryland,* 373 U.S. 83, at 87 (1963). Proof that the Government's inaction was actuated by the equivalent of malice may not only be impossible to acquire, thus rendering the right unattainable, but the potential for prejudice is unameliorated whether the delay is vindictive, negligent, or merely inefficient.

As there is no decision of this Court requiring the victim of a trial delayed to show unlawful motive on the part of the Government, so there is no decision requiring a showing of "actual" prejudice attributable to the delay as a conditon to dismissal of stale charges against him. *United States* v. *Ewell,* 383 U.S. 116 (1966), held the right to a speedy trial not violated by reindictment for the same offense when prior indictments (to which guilty pleas had been entered about a year earlier) were voided on technical grounds, in the absence of a showing of prejudice of any description.

Actual prejudice there is, however, in all excessive delay, whether or not demonstrated upon the record. The essence of the trial process itself is a reconstruction of past events from present memory, and the phenomenon of the attenuation of human memory over an interval of months and years is so much a part of universal human experience that its formal demonstration from the witness stand would be superfluous. The entire body of the law of evidence is devoted to assuring

as much accuracy as possible from an essentially unreliable faculty. See, generally, Hutchins and Slesinger, *Some Observations on the Law of Evidence—Memory,* 41 Harv. L.Rev. 860 (1928). It is axiomatic that "[t]he more recent the experience, the better the memory of it." Gardner, *The Perception and Memory of Witnesses,* 18 Corn. L.Q. 391, at 392-393 (1933).

Unlike a prosecution for a single dramatic event such as a crime of violence, a prosecution for business fraud alleged to have persisted for a two-year period will be predicated upon evidence the defendant will not be able to predict or ascertain with any certainty. Until the Government's case is disclosed to him, he may not know which "specific evidence . . . has actually disappeared or has been lost, [or] witnesses who are known to have disappeared." *United States* v. *Ewell,* 383 U.S. 116, at 122 (1966). Moreover, when the potential prejudice inhering in delay in the disposition of criminal charges is that of his own loss of detailed recollection of telephone conversations, business conferences and negotiations, the circumstances surrounding the routine execution of contract forms, and similar unremarkable events long past, to impose upon a defendant the burden of a formal display of his fallible memory in support of his claim of prejudice is to offer him a Hobson's choice in electing to assert his speedy trial right. Since it is to his advantage to prove the prejudice and secure his freedom, the defendant's protestations of an inability to remember are likely to be given limited credence and rejected. If so, then for all practical purposes the Government's version of the disputed events will prevail, no matter the defendant's testimony which is *a priori* impeached by his prior disclaimer of memory of those events, with his very testimony from purported

memory, however, further rebutting his claim of prejudice.

Academic commentators are agreed that a showing of actual prejudice where it exists as a prerequisite to relief under the speedy trial clause should be discarded. Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, at 493 (1968); Note, *Constitutional Right to a Speedy Trial: The Element of Prejudice and the Burden of Proof,* 44 Temp. L.Q. 310, at 316 (1971); Note, *Constitutional Limits on Pre-Arrest Delay,* 51 Iowa L.Rev. 670 at 678-679 (1966). The potential for prejudice is sufficiently apparent in the circumstance of delay alone to allow it to be presumed.

In the instant case the indictment, filed April 21, 1970, charges fraudulent motive and conduct in the course of appellee's business activities over a 23-month period beginning March 15, 1965. Appellee's entire business records have been in the Government's exclusive possession for over two years now at the minimum and a possible three years at the maximum. He has not been in that business for more than four years. There is certainly a "reasonable possibility" that he will not be able to remember and to testify with clarity about the allegedly illegal transactions of which he is accused. And in the District of Columbia no more, at present, is required. *Hedgepeth* v. *United States,* 364 F.2d 684 (D.C. Cir. 1966); *Harling* v. *United States,* 401 F.2d 392 (D.C. Cir. 1968), certiorari denied, 393 U.S. 1086 (1969); *Hinton* v. *United States,* 424 F.2d 876 (D.C. Cir. 1969); *United States* v. *Holt,* (App. No. 23, 928, D.C. Cir., decided June 28, 1971).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as without the jurisdiction of the Court. Alternatively, as a matter of the proper scope of review of a discretionary ruling of a trial court or upon a proper interpretation of the Sixth Amendment as applied to the circumstances of this case, the order of the District Court from which this appeal is taken should be affirmed.

Respectfully submitted,

THOMAS PENFIELD JACKSON
Attorney for Appellee
William R. Marion

July, 1971.

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